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Via First Class Mail
Nancy M. Morris, Secretary
Securities & Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9303

Re: Proposed NASD Rule 12504 – Dispositive Motions, SR-NASD-2006-088

Dear Ms. Morris:

As a lawyer who has been involved in the securities arbitration process for more than 20 years, as an advocate, arbitrator, and member of the National Arbitration and Mediation Committee, I would like to offer my comments on the NASD proposed Rule 12504, which deals with dispositive motions in arbitration.

I support the position presented by the Public Investors Arbitration Bar Association ("PIABA") in its letter dated September 21, 2006. While I had previously supported Rule 12504, as submitted by the NASD, I have become concerned by the fact that the securities industry is apparently treating the very filing of the proposed rule as the occasion to open the floodgates for inundating securities arbitrations with motion to dismiss. This is completely inappropriate and highlights the need for even more explicit direction than is afforded by the NASD's proposed language.

Motions to dismiss are a routine part of court practice that should never become routine in arbitration. Plaintiffs in federal or state court are afforded tremendous protection when it comes to motions to dismiss or for summary judgment. This protection starts with the fact that motions are decided by judges who are supposed to rule on the basis of explicit procedural requirements and legal precedent. Errors can be corrected on appeal. In contrast, many arbitrators are not lawyers, much less judges. Moreover, according to the NASD's publication for arbitrators, "arbitrators are not bound by case precedent or statutory law." (*The Neutral Corner*, April, 2006).[1] Finally, there is no effective review on appeal of erroneously decided motions to dismiss arbitration claims. Thus, a claimant whose arbitration claim is dismissed based upon a "mere error of law" will have lost his right to recovery once and for all time.

[1] In fact, arbitrators are advised by the NASD not to do independent legal research in deciding issues of law, but to rely only on briefs submitted by the parties. In the context of dispositive motions, this puts pro se parties at an extreme and unfair disadvantage they would not face in court.

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It could well be argued that motions to dismiss are antithetical to the arbitration process. Indeed, this point was more or less made when Marc Lackritz, President of the Securities Industry Arbitration (SIA) testified before the Committee on Financial Services of the U.S. House of Representatives (March 17, 2005). According to Mr. Lackritz, arbitration is "a system that works," which is "a fair and efficient means of resolving disputes between customers and brokerage firms." He testified that a major reason the process is fair to claimants is because "parties who utilize arbitration are far more likely to have their claims aired in a full hearing and decided on the merits rather than won or lost on technicalities." Mr. Lackritz pointed out arbitration gives clients a chance to be heard on the merits which "is [in] sharp contrast to court proceedings, where a significant percentage of claims are dismissed on prehearing motions to dismiss or for summary judgment." If arbitration is "a system that works" as the SIA claims, one of the primary advantages that system affords claimants should not be fundamentally altered.

PIABA's proposed revisions to Rule 12504 strike the appropriate balance between allowing motions to dismiss in truly exceptional circumstances where there is absolutely no purpose for a hearing, and not undermining the arbitration process with motion practice it is not equipped to handle.

Very truly yours,

GARD SMILEY BISHOP & PORTER LLP

Brian N. Smiley

cc: Ms. Robin Ringo (via first class mail)